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No. 10-314

In the Supreme Court of the United States

DEVIN WELCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

With respect to petitioner's first issue, the scope of the "prior conviction" exception in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the government does not dispute the importance of the question presented, and it concedes that the federal courts of appeals and state courts of last resort are openly divided over the issue. The government offers no valid reason why this Court should deny certiorari. To the contrary, its opposition underscores the pervasive confusion over the issue, which is reflected in the different approaches taken by the lower courts.

As the government points out, petitioner's second issue—whether vehicular flight from a police officer constitutes a "violent felony" under the Armed Career Criminal Act (ACCA)—is currently before the Court in *Sykes v. United States*, No. 09-11311 (cert. granted Sept. 28, 2010). Petitioner agrees that this Court's decision in *Sykes* may affect the disposition of his ACCA claim. However, because the *Apprendi* issue warrants review and is not addressed by *Sykes*, the petition should be granted.

I. The Lower Courts Are Divided Over The Scope Of *Apprendi*'s "Prior Conviction" Exception

As the petition demonstrates, the Seventh Circuit's holding that *Apprendi*'s "prior conviction" exception applies to nonjury juvenile adjudications conflicts both with the rulings of other courts and with this Court's Sixth Amendment precedents. The government concedes (at 10-11) that the lower courts are divided over the issue. Indeed, the government has previously urged this Court to grant review on this issue "[i]n light of the square circuit conflict, which

involves a question of recurring importance." See Brief for the United States 11, *Smalley v. United States*, No. 02-6693 (Dec. 13, 2002); Amicus Brief for the United States 8, *Hitt v. Kansas*, No. 01-10864 (Dec. 13, 2002).

The government now retreats from its previous recommendation for review and attempts to downplay the significance of the split among the courts. The government states that "[t]he decisions that petitioner claims are on his side of a split decided only the distinct, narrower question . . . whether the fact of a prior juvenile adjudication secured without a jury trial guarantee may be found by a sentencing judge, or must instead be found by a jury." Opp. 14. The government further argues that none of the circuit courts or state supreme courts hold that nonjury juvenile adjudications "could not be considered at all, or that the facts underlying them would have to be retried in the subsequent case." *Id.* at 10, 15.

But that is precisely what the Louisiana Supreme Court held. "[W]e find because juveniles do not have a right to a jury trial in these proceedings, juvenile adjudications cannot be used to enhance adult felony convictions." *State v. Brown*, 879 So. 2d 1276, 1288 (La. 2004). In holding that nonjury juvenile adjudications fall outside *Apprendi*'s "prior conviction" exception, the *Brown* court did not suggest that the constitutional violation would be cured merely by proving the existence of the prior juvenile adjudication to a jury in the subsequent case, as the government contends. Rather, the court held that any use of such adjudications is impermissible because "[i]t would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancer."

Id. at 1289. As the court observed, "[i]t seems contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use adjudications obtained for treatment purposes to punish them more severely as adults." *Ibid.* Submitting only the "fact" of a defendant's juvenile adjudication to a jury in the adult case would do nothing to relieve this concern.

The Ninth Circuit did not explicitly state the reach of its Sixth Amendment ruling in *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), but *Tighe* and later Ninth Circuit precedent are at odds with the government's view. The government suggests (at 15) that *Tighe* permits a prior nonjury juvenile adjudication to be used for sentence enhancement if its existence is proven to a jury. Its only support for this position is found in a footnote in *Tighe* observing that various procedures could be used "to mitigate any prejudice to the defendant." 266 F.3d at 1194 n.5. However, after finding that the district court erred in counting the defendant's juvenile adjudication as a predicate offense under the ACCA, the court did not remand for a new trial to a jury to prove the fact of the prior adjudication. Instead, the court concluded that "Tighe could not be subjected to an enhanced sentence under ACCA" and remanded for resentencing without the enhancement at a lower offense level. *Id.* at 1195. Moreover, the Ninth Circuit later characterized *Tighe* as holding that "we do not recognize nonjury juvenile adjudications as 'convictions' falling within the *Apprendi* exception, and ordinarily we do not allow sentencing enhancements based on such adjudications." *Boyd v. Newland*, 467 F.3d 1139, 1151-52 (9th Cir. 2006).

In his dissent below, Judge Posner likewise interpreted *Apprendi* to preclude the use of prior nonjury juvenile adjudications to increase a defendant's sentence beyond the statutory maximum. Contrary to the government's argument (at 10) that "the reliability of juvenile adjudications based on the lack of a jury trial right [is] beside the point," Judge Posner viewed the reliability of juvenile adjudications as dispositive of the question whether such adjudications could be used for sentence enhancement purposes consistent with the Sixth Amendment. As he observed, "if it is true that juvenile defendants fare worse before judges than they would before juries—if there is reason to think that trial by jury would alter the outcomes in a nontrivial proportion of juvenile cases—one cannot fob off the *Apprendi* argument with the observation that a jury makes no difference." Pet. App. 47a-48a. In concluding that "a juvenile court 'conviction' is not usable for enhancing a federal sentence," Pet. App. 48a, Judge Posner agreed with what the government characterizes as petitioner's "broader claim."

Among the courts holding that *Apprendi*'s "prior conviction" exception does not apply to nonjury juvenile adjudications, only the Oregon Supreme Court has stated explicitly that a defendant's Sixth Amendment rights would be protected as long as the existence of the prior adjudication is later proved to a jury. The court held that prior juvenile adjudications could be used as sentencing factors, but that "the Sixth Amendment requires that when such an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must either be proved to a trier of fact or be admitted by a defendant." *State v. Harris*, 118 P.3d 236, 246 (Or. 2005).

Petitioner submits that the Sixth Amendment requires that a defendant have the right to contest before a jury the facts underlying any adjudication that would serve as a basis for sentence enhancement, and not merely the fact that the prior adjudication occurred. *Cf. Blakely v. Washington*, 542 U.S. 296, 306-07 (2004) ("The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish."). *Apprendi* carves out an exception for the fact of a "prior conviction" as a basis for sentence enhancement because of the presumed reliability of the conviction itself, not because of the accuracy of its record-keeping. See *Apprendi*, 530 U.S. at 488 ("the certainty that procedural safeguards attached to any 'fact' of prior conviction . . . mitigate[s] the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range").

However, even if the government were correct that *Apprendi* at most provides a right to challenge before a jury the existence of a prior nonjury juvenile adjudication, rather than the facts underlying that adjudication, such an interpretation would still entitle petitioner to be resentenced. Petitioner here was not permitted to contest the fact of his juvenile adjudication to a jury. A new sentencing proceeding would ensure that the jury right enshrined in the Sixth Amendment and given renewed effect in *Apprendi* continues to provide meaningful protection against oppressive sentences. See *United States v. Maybury*, 274 F.2d 899, 902 (2d Cir. 1960) (Friendly,

J.) ("the jury has the power to bring in a verdict in the teeth of both law and facts . . . to prevent the punishment from getting too far out of line with the crime").

Ultimately, the government cannot deny that the lower courts have adopted a range of inconsistent approaches to *Apprendi*'s "prior conviction" exception. A majority hold that nonjury juvenile adjudications fall within the exception. Among those courts holding that the exception does not apply, there is confusion over the implications of that conclusion—i.e., whether it means that such adjudications cannot be used at all or can be used only if their existence is proven to a jury. There is no prospect that the conflict will resolve itself absent this Court's intervention. Only this Court can clarify the proper scope of *Apprendi*'s "prior conviction" exception.

II. This Case Provides A Suitable Vehicle For Resolution Of The Conflict

The government invokes the familiar refrain that petitioner's Sixth Amendment claim should not be addressed through certiorari because this case supposedly "is a poor vehicle" for review. To the contrary, petitioner's case vividly demonstrates the impact of using prior juvenile adjudications for sentence enhancement. Welch's criminal history ordinarily would have resulted in a sentencing range of 77 to 96 months, but the trial court's use of his nonjury juvenile adjudication as an ACCA predicate automatically raised his minimum sentence to 15 years. Pet. 5. The constitutionality of this substantial increase can only be determined by this Court's resolution of the question presented. In any event, the government's vehicle arguments are groundless.

First, the government maintains that review is inappropriate because the *Apprendi* issue was decided below on a petition for collateral relief under an ineffective assistance of counsel claim. But the posture is immaterial in this case because the Seventh Circuit decided the *Apprendi* issue squarely on the merits. Pet. App. 33a ("Strictly speaking, [the *Strickland*] standard does not require that we actually decide the merits of the underlying issue. However, in the context of this specific issue, considerations of judicial economy counsel that we address the underlying issue and decide it."). The Seventh Circuit's holding regarding *Apprendi*'s "prior conviction" exception is now the law of the circuit. As such, this petition is an appropriate vehicle for resolving the question presented. See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is . . . in a state of evolving definition and uncertainty, and one of importance to the administration of federal law.") (internal quotation marks and citations omitted).

The government also argues that Welch's guilty plea at the time of his juvenile adjudication undermines his Sixth Amendment claim. But there is a vast difference between pleading guilty in a proceeding that guarantees a defendant a jury trial right and pleading guilty where there is no such right. As this Court has observed, "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. . . . Even when defendants [waive jury] trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfair-

ness less likely." *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968). In the absence of a right to a jury trial, petitioner obviously could not have made a knowing and voluntary waiver of that right. Further, admissions by juveniles lack the reliability that the government claims would mitigate these Sixth Amendment concerns. Juveniles plead guilty in the overwhelming majority of cases, and they have a higher rate of false guilty pleas because of their aversion to the risks of trial, their tendency to focus on short-term rather than long-term consequences, their compliance with adult authority figures, and their immaturity in judgment. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground For Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 292-93 (2007); Amicus Brief of Center on Wrongful Convictions of Youth, et al. 17-19.

The government next suggests that this case is a poor vehicle because Welch has not challenged the "fact" of his juvenile adjudication. In fact, Welch has consistently objected to the use of his juvenile adjudication as an ACCA predicate. Pet. 5-6. That is all that is necessary for this Court to consider his *Apprendi* claim.

Finally, the government states (at 3) that according to his Presentence Investigation Report, Welch "had four prior convictions that were 'violent felonies' for purposes of the ACCA." As the government notes, the district court did not rely on Welch's aggravated battery conviction for spitting in classifying him as an ACC. If this Court holds that either of Welch's convictions at issue in this appeal does not qualify as a predicate offense under the ACCA, then his spitting conviction would not substitute as a third qualifying offense if the government subse-

quently chooses to revisit the issue. Several cases decided since Welch's sentencing confirm that spitting would not fall within the ACCA's definition of a "violent felony." See, *e.g.*, *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010) ("We think it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force —that is, force capable of causing physical pain or injury to another person. Even by itself, the word 'violent' in § 924(e)(2)(B) connotes a substantial degree of force.") (citation omitted); *United States v. Martinez-Sanchez*, 278 F. App'x 676, 678 (7th Cir. 2008) (aggravated battery under Illinois statute in some cases may be nonviolent; citing example of spitting on police officer as an aggravated battery "where the defendant did not engage in force that is 'violent in nature'"). In other words, a determination that either of Welch's challenged convictions does not count for ACCA purposes would preclude a finding that Welch is subject to the ACCA's mandatory minimum sentence.

In short, because the government's vehicle arguments lack merit, and because this Court's intervention is necessary to resolve a deepening conflict on an important and recurring question, review of this case is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold the petition for disposition pending its decision in *Sykes*.

Respectfully submitted.

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